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No. 93-543

In the Supreme Court of the United States

OCTOBER TERM, 1993

GOLDSTEIN & BARON, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a taxpayer who receives a mistaken refund of a tax payment and thereafter repays that same amount to the Treasury is entitled to receive a "refund" of its payment when the taxpayer does not dispute that it in fact owed that amount as taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-10b) is reported at 995 F.2d 35. The opinion of the district court (Pet. App. 1a-21a) is unofficially reported at 70 A.F.T.R.2d ¶92-5207.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1993. The petition for rehearing was denied on June 29, 1993 (Pet. App. 1c-2c). The petition for a writ of certiorari was filed on September 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's employment tax return for the third quarter of 1985 accurately reported a liability of $28,740.35. The Internal Revenue Service mistakenly recorded the return as if it reported a total liability of only $11,831.35. Because petitioner had made tax deposits of $27,212.36 for that quarter, the Service's records erroneously reflected a credit balance for petitioner of $15,381.01. The Service applied that erroneous credit balance to petitioner's employment tax liability for the fourth quarter of 1985 (Pet. App. 2a-3a).

Petitioner subsequently filed its employment tax return for the fourth quarter of 1985, reporting a liability of $31,116.72 and deposits of $31,136.16, for an overpayment of $19.44 (Pet. App. 3a). Accumulating this fourth quarter credit balance with the erroneous balance from the third quarter, the Service's records mistakenly showed a credit balance of $15,400.45 for the fourth quarter. On February 17, 1986, the IRS refunded that amount, plus interest, to petitioner (*ibid.*).

Petitioner promptly cashed the check. Petitioner also advised the Service by letter dated March 6, 1986, that (other than the amount of $19.44, which is not in dispute) it did not understand the reason for the refund (Pet. App. 3a-4a, 4b). By letter dated May 5, 1986, the IRS sent a status report of petitioner's account for the third and fourth quarters of 1985 to show why the refund was made (C.A. App. 35, 44). Petitioner did nothing to point out to the Service the inconsistency between the amount shown on that report as having been assessed for the third quarter

of 1985, and the amount of its admitted liability for that quarter.

In early February 1988, the Service discovered its mistake and reversed the erroneous credit (Pet. App. 4a-5a). As a result, petitioner's account showed a zero balance for the third quarter and an underpayment of $15,381.01 for the fourth quarter. The Service demanded repayment of that amount, plus interest (*id.* at 5a). When petitioner declined to pay, the Service filed a notice of tax lien on petitioner's property (C.A. App. 36, 49). In March 1989, petitioner paid the amount demanded and filed a claim for refund, which the IRS denied (*id.* at 36-37, 56).

2. Petitioner filed suit in district court to obtain a refund of the amount it paid to the Treasury in March 1989. Petitioner contended that, in order to recover the amounts erroneously paid to petitioner in March 1986, the government was required to bring suit for an "erroneous refund" under 26 U.S.C. 7405 within the two-year statute of limitations provided in 26 U.S.C. 6532(b). The United States contended that, under 26 U.S.C. 6502(a) (1980), the government had six years from the date of the assessment made for the fourth quarter of 1985 in which to collect taxes owing for that quarter, including the taxes owed as a result of the mistaken refund. Since the taxpayer had paid the amount actually owed within that period, the government's collection was timely (C.A. App. 63-64). The government further contended that, since taxpayer did not dispute that it in fact owed the underlying taxes, it was not entitled to a refund in any event (*id.* at 67-69).

The district court agreed that the government had six years to collect taxes owed after assessment. The

court concluded, however, that once an assessment is paid, it is "extinguished." The court held, in these circumstances, that the government has only two ways to recover a mistaken refund: (i) by filing an "erroneous refund" suit within the two-year period allowed by 26 U.S.C. 6532(b); or (ii) by making a *new* assessment within the three-year period allowed for assessment under 26 U.S.C. 6501(a). Pet. App. 8a-10a, citing *United States* v. *Wilkes*, 946 F.2d 1143, 1150 (5th Cir. 1991). The district court rejected the government's claim that petitioner was not entitled to a refund because it had not overpaid its taxes (Pet. App. 10a-13a).

3. The court of appeals reversed (Pet. App. 1b-10b). The court did not decide whether the petitioner's original payment "extinguished" the tax assessment and precluded suit by the government to recover the taxes owed on that assessment (*id.* at 8b). Instead, the court concluded that the government should prevail in this case under "a different route than that advanced by the IRS" (*id.* at 8b). The court held that the taxpayer could not recover the amounts it paid to the Treasury in March 1989 because "the taxpayer acknowledge[d] in writing that it was not entitled to the refund" (*ibid.*), did not contest that it in fact "owed the money" (*ibid.*), and had therefore "waived any objection it may have had to the collection of the funds it legitimately owed the IRS" (*id.* at 10b).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that petitioner was not entitled to a refund of tax. Although the court used the term "waiver" to describe its holding, the court's analysis implicitly accepts the govenment's contention that a refund was not owed because petitioner had not overpaid its taxes.[1] A taxpayer is entitled to a refund only when he establishes that he has in fact made an overpayment of taxes. In *Lewis* v. *Reynolds*, 284 U.S. 281, 283 (1932), this Court stated:

> An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

See also *Crompton & Knowles Loom Works* v. *White*, 65 F.2d 132, 133-134 (1st Cir.) (taxpayer not entitled to refund of amount paid after demand even though IRS had not assessed that amount prior to collection), cert. denied, 290 U.S. 669 (1933); *Ewing* v. *United States*, 914 F.2d 499, 504-505 n.13 (4th Cir. 1990), cert.

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[1] Assessment is not necessary to the proper collection of a tax. It is only one method of collection. A timely lawsuit, without assessment, is an alternative method. See 26 U.S.C. 6501(a); *United States* v. *Chamberlin*, 219 U.S. 250 (1911); 4 B. Bittker & L. Lokken, *Federal Taxation of Income, Estates and Gifts* § 111.6.1, at 111-143 (2d ed. 1992). The government may thus retain, without assessment, any tax paid within the period during which an assessment could be made or a suit could be brought. The payment at issue in this case was made well within that period. See 26 U.S.C. 6501(a).

denied, 500 U.S. 905 (1991); Rev. Rul. 85-67, 1985-1 C.B. 364. Petitioner acknowledged that the refund was in error and did not "contest[] the fact that [it] owed the money" (Pet. App. 8b). Since petitioner had not overpaid its taxes, petitioner was not entitled to a refund.

2. Petitioner contends (Pet. 21-25) that the decision in this case misapplies settled law in concluding that a waiver had occurred that "would extend the statute of limitations for the IRS to recover the refund" (Pet. 22 n.3). Petitioner's description of the court's holding is not correct. The court did not say that petitioner had agreed to waive the statute of limitations on collection of the tax. Instead, the court stated that petitioner had waived its right to seek a refund because petitioner had acknowledged that the tax was actually owed. The court specifically held that, "[i]n light of [petitioner's] legitimate debt to the IRS and [petitioner's] acknowledgment that it was not entitled to the refund, we conclude that the IRS is entitled to the funds paid under protest in this case[]" (Pet. App. 9b-10b). There is no conflict of decisions on the specific reasoning or holding of the court of appeals in this case.[2]

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[2] As petitioner points out (Pet. 22-23), the Internal Revenue Code places strict conditions on an extension of the time for collecting taxes, including a requirement of a written agreement between the taxpayer and the IRS that is signed by both parties. 26 U.S.C. 6502(a). The court's holding that petitioner had waived its claim for the return of the funds it had paid to the Treasury is based on the conclusion that petitioner actually owed the taxes it had paid (Pet. App. 8b-9b). The "waiver" cases on which petitioner relies are therefore inapposite.

3. Petitioner asserts (Pet. 11-19) that there is a conflict of decisions on the question whether payment of a tax "extinguishes" the underlying assessment. Petitioner acknowledges, however, that the court of appeals did not "address the issue" in this case (Pet. 15). Because the asserted conflict is not presented in this case, and because its resolution is not necessary to support the judgment below, this case does not present an appropriate occasion for the question to be addressed by this Court. We note, moreover, that petitioner cites only one appellate decision on this issue (Pet. 13) and does not suggest that there is yet a conflict among the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's further contention (Pet. 20-21) that the court of appeals erred in considering the issue of "waiver"—because it was an affirmative defense that had not been asserted in the pleadings—is defective for the same reason, for it fails to recognize the underlying analytical basis of the court's holding.